No. 83-2164

In the Supreme Court of the United States

OCTOBER TERM, 1984

NICHOLAS ANGLETON, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR.,
SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
REBECCA P. DICK
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

GERSHON M. RATNER
Associate General Counsel

CAROLYN B. LIEBERMAN
Assistant General Counsel

PAUL G. LEIMAN
Attorney

Department of Housing and Urban Development
Washington, D.C. 20410

QUESTION PRESENTED

Whether the Secretary of Housing and Urban Development acted lawfully in approving the conversion of apartments carrying mortgage insurance under the National Housing Act, 12 U.S.C. 1713, from traditional rental housing to cooperative housing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes—Continued:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-2164

NICHOLAS ANGLETON, ET AL., PETITIONERS

v.

SAMUEL R. PIERCE, JR.,
SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The summary affirmance of the court of appeals (Pet. App. 55) is reported at 734 F.2d 3 (Table). The opinion of the district court (Pet. App. 22-53) is reported at 574 F. Supp. 719.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55) was entered on April 18, 1984. A petition for rehearing was denied on May 10, 1984 (Pet. App. 56). The petition for a writ of certiorari was filed as of June 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 207(b) of the National Housing Act, 12 U.S.C. 1713(b), is reproduced at Pet. 2-4.

STATEMENT

1. Section 207(b) of the National Housing Act, 12 U.S.C. 1713(b), authorizes the Secretary of Housing and Urban Development to insure mortgages that cover property held by government instrumentalities or "any other mortgagor approved by the Secretary." Housing that carries mortgage insurance pursuant to this provision is "regulated * * * by the Secretary as to rents or sales, charges, capital structure, rate of return, and methods of operation to such extent and in such manner as to provide reasonable rentals to tenants and a reasonable return on the investment." The insurance of mortgages under Section 207(b) is intended "to facilitate particularly the production of rental accommodations, at reasonable rents, of design and size suitable for family living." 12 U.S.C. 1713(b)(2).

In 1964, the Secretary agreed to insure the mortgage on Troy Towers Apartments in Union City, New Jersey, for a term of up to 40 years, pursuant to 12 U.S.C. 1713(b). The Secretary entered into a regulatory agreement with the private owners who were constructing the apartments; that agreement provided, inter alia, that neither the mortgagor nor its successors would charge rents in excess of those approved by the Secretary or convey the property or require, as a condition of occupancy, any consideration other than the payment of two months' rent without the written approval of the Secretary. Pet. App. 26.

In 1981, a new landlord-owner notified tenants in Troy Towers that it intended to convert the apartments to cooperative housing. Each tenant was offered the opportunity to purchase shares at a price of $74 per share (for a total of $25,000 to $45,000 per unit) and to enter into a 50-year lease. At least 50% of the price of the shares was to be paid in advance. If a tenant did not subscribe within a 90-day period, the shares were to be offered to the public at $94 per

share. Each tenant was served with a notice of eviction of non-subscribing tenants, enforceable in court three years hence or at the expiration of the tenant's lease, whichever was later, pursuant to N.J. Stat. Ann. § 2A:18-61.2g (West Supp. 1984). The notice advised tenants of the extensive protections afforded to them under the New Jersey law governing conversion of apartments to cooperative housing. Petitioners, who are tenants in Troy Towers, did not subscribe to the conversion offering. Pet. App. 22-23, 27-29, 35.

2. Petitioners brought this action in the United States District Court for the District of New Jersey, seeking a declaratory judgment, mandamus, and an injunction against the Secretary's approval of conversion of the Troy Towers Apartments (Pet. App. 23).[1] Petitioners alleged that conversion of HUD-insured apartments to cooperative housing would violate the intent underlying the National Housing Act that federal mortgage insurance be used primarily for rental dwellings and the statutory requirement of "reasonable" rents and rates of return in HUD-insured housing. They also contended that conversion would deny them constitutionally protected property rights accruing under 12 U.S.C. 1713 and the 1964 regulatory agreement between HUD and the original mortgagor.[2] The district court stayed

---

[1]HUD's standards for conversion of traditional rental housing to cooperative housing are found in HUD Notice H-80-83, 45 Fed. Reg. 67777 (1980). The Secretary may approve a transfer of assets to a purchaser who intends to make such a conversion if project rents prior to conversion equal or exceed 125% of fair market rents for such units and the owner provides tenants with certain protections, including notice and an opportunity to buy their units at the lowest sale price at which the unit is offered. See Pet. App. 26-27.

[2]Petitioners also contended that Union City ordinances created constitutionally protected property rights that were infringed by the conversion. See Pet. App. 44-45. They do not raise that contention in this Court.

proceedings pending the Secretary's review of the proposed transaction (Pet. App. 23).

After the Secretary approved the transfer of assets and conversion subject to certain conditions, the district court dismissed the complaint for failure to state a claim upon which relief could be granted (Pet. App. 22-53). The court concluded initially that petitioners had standing to raise their statutory and constitutional claims (*id.* at 30-32). It held (*id.* at 33-35), however, that the National Housing Act commits determination of reasonable rents and rates of return to the Secretary's discretion and that such determinations regarding the amount of charges for cooperative units are not subject to judicial review. The court also held (*id.* at 35-41) that cooperative housing is eligible for mortgage insurance under 12 U.S.C. 1713 and that the Secretary's approval of the transfer of the assets of Troy Towers did not violate the statute. Finally, the court concluded that petitioners had failed to state a cognizable due process claim and that they could not sue as third-party beneficiaries under the 1964 regulatory agreement between the Secretary and the original mortgagor (Pet. App. 41-47).

3. The court of appeals affirmed summarily on the basis of the district court's reasoning (Pet. App. 55).[3]

ARGUMENT

The court of appeals' summary affirmance of the district court's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. This case does not present any significant practical concerns that would warrant further review of the decision below. Petitioners do not contend that there is any conflict

---

[3]The court of appeals stayed issuance of its judgment until June 29, 1984 (Pet. App. 57). On June 4, 1984, Justice Brennan denied petitioners' motion for further injunctive relief (*id.* at 58).

among the circuits on any of the questions they present for review; indeed, they concede (Pet. 10) that this is a case of first impression. Based on past experience, it seems unlikely that claims of the sort raised by petitioners will recur with any frequency. Although the National Housing Act has permitted conversions of federally insured apartments to cooperative housing since 1938, this is one of only two cases challenging the legality of such a conversion of which we are aware.[4]

Moreover, the injury petitioners allege is of a limited nature. Petitioners do not contend that they are being charged an unreasonable price for participation in the cooperative. Nor have they presented any evidence that they could not afford to purchase shares at the price offered to them. Any tenants who are elderly or disabled, and who are living on limited incomes, are entitled to protection from conversion for a period of 40 years, pursuant to N.J. Stat. Ann. §§ 2A:18-61.22 *et seq.* (West Supp. 1984). Although petitioners and other tenants who declined to subscribe may ultimately face eviction, New Jersey law affords them substantial protection against unreasonable dislocation, including provisions for an offer of comparable housing, up to five years' stay of eviction, or waiver of five months' rent. N.J. Stat. Ann. § 2A:18-61.11 (West Supp. 1984). See Pet. App. 28.

2. The decision below is correct. Petitioners' primary claim — that traditional rental housing insured under 12 U.S.C. 1713 may not be converted to cooperative housing — is without merit. The statute on its face provides that the Secretary may insure mortgages covering property held by

---

[4]The other case, *Boston Five Cents Savings Bank* v. *Pierce*, No. 82-34-T (D. Mass.), was brought by a mortgagee. The magistrate's report in that case, which is currently pending before the district court, recommends grant of the government's motion for summary judgment.

"any other mortgagor approved by the Secretary." 12 U.S.C. 1713(b)(2). That broad language on its face appears to cover the cooperative association here.[5] Moreover, as the district court explained (Pet. App. 37-41), the legislative history of the statute leaves no doubt that cooperatives are eligible for federally insured mortgages. In 1938, Congress amended the National Housing Act to include "cooperative societies which are legal agents of owner-occupants" in the list of mortgagors eligible for insurance under 12 U.S.C. 1713. National Housing Act Amendments, ch. 13, § 3, 52 Stat. 17. In 1961, the list of specific eligible mortgagors was deleted from the statute and replaced by the current reference to "any other mortgagor approved by the Secretary." 12 U.S.C. 1713(b)(2). The Senate report indicates that that change was intended to expand the class of eligible mortgagors, not to limit it in any way. S. Rep. 281, 87th Cong., 1st Sess. 45-46 (1961). Thus, the statute clearly authorizes insurance of mortgages for cooperatives, as well as for traditional rental housing.[6]

---

[5]Petitioners insist that Section 1713 requires the Secretary to use federal mortgage insurance to maintain rental housing. See Pet. 11. But the statutory reference to facilitating production of rental accommodations is not confined to traditional rental housing. See 12 U.S.C. 1713(a)(6), which defines rental housing to include housing in which payment of agreed charges over a period of time will entitle the occupant to ownership of the premises. Even if cooperatives did not constitute a form of rental housing, Section 1713 does not preclude mortgage insurance for other types of housing; and the legislative history summarized in the text, *infra*, makes clear that Congress intended that federal mortgage insurance would be available for cooperative housing. The district court considered petitioners' contention carefully (see Pet. App. 35-41) and rejected it as inconsistent with the statute and legislative history.

[6]Petitioners allude at several points (*e.g.*, Pet. 4, 10, 12) to the contention they made below that 12 U.S.C. 1713 preempts the New Jersey eviction statute. That contention reflects a misconception concerning preemption. Such an issue would arise only if there were a conflict between federal and state statutes, *e.g.*, if the New Jersey statute allowed

The courts below correctly concluded that petitioners' contention that the Secretary approved an unreasonable rent and rate of return on insured housing in consenting to the conversion is not subject to judicial review. The Secretary's determinations concerning proper levels of rent and rates of return are essentially economic and managerial decisions. The statute provides no standards to guide the determinations of what rents and rates of return are "reasonable." In cases involving other provisions of the National Housing Act, the courts have held consistently that approval of rent increases for federally supported housing is committed to the Secretary's discretion and is not judicially reviewable. See, *e.g.*, *Falzarano* v. *United States*, 607 F.2d 506, 512-513 (1st Cir. 1979); *Harlib* v. *Lynn*, 511 F.2d 51, 56 (7th Cir. 1975); *Langevin* v. *Chenango Court, Inc.*, 447 F.2d 296, 302-304 (2d Cir. 1971); *Hahn* v. *Gottlieb*, 430 F.2d 1243, 1249-1251 (1st Cir. 1970); *People's Rights Organization* v. *Bethlehem Associates*, 356 F. Supp. 407, 410-411 (E.D. Pa.), aff'd mem., 487 F.2d 1395 (3d Cir. 1973) (Table).

Petitioners' constitutional claim is clearly insubstantial. Neither the National Housing Act nor the regulatory agreement between the Secretary and the mortgagor confers on tenants any entitlement to remain in their apartments indefinitely under the 1981 rental terms; indeed, both the statute and the regulatory agreement make clear that it is within the Secretary's discretion to approve changes in the rental terms. The regulatory agreement expressly permits the mortgagor to increase rents or sell the apartments with the prior approval of the Secretary. See Pet. App. 51-52

---

conversion of petitioners' apartments, but the federal statute did not. Since mortgages on cooperatives may be insured under 12 U.S.C. 1713, there is no conflict with New Jersey law, and the issue of preemption does not arise.

n.19. Moreover, petitioners have not identified any defect in the procedures followed by the Secretary in this case. Tenants of Troy Towers received notice of the conversion and were given an opportunity to submit written objections, to which the Secretary responded. *Id.* at 42. In these circumstances, there is no basis for petitioners' claim that they were deprived of property without due process of law.[7]

---

[7]Petitioners' suggestion (Pet. 10-11) that they are third-party beneficiaries of the 1964 regulatory agreement between the Secretary and the initial mortgagor of their apartments is without merit. Although that agreement conferred incidental benefits on petitioners, the district court found (Pet. App. 47) that it was primarily a loan agreement and did not have the specific purpose of conferring benefits on tenants. Petitioners therefore cannot claim rights as third-party beneficiaries thereunder. See *e.g.*, Restatement (Second) of Contracts §§ 302, 304, 315 (1981); *Falzarano* v. *United States*, 607 F.2d at 511; *Harlib* v. *Lynn*, 511 F.2d at 55-56.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
REBECCA P. DICK
Attorneys

GERSHON M. RATNER
Associate General Counsel

CAROLYN B. LIEBERMAN
Assistant General Counsel

PAUL G. LEIMAN
Attorney

Department of Housing and Urban Development

SEPTEMBER 1984

DOJ-1984-09